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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1705

JOSEPH BOMBACINO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.)

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported at 51 Ill. 2d 17; 280 N. E. 2d 205.

JURISDICTION.

Jurisdiction in this Court has been adequately alleged.

QUESTIONS PRESENTED.

Whether it is constitutionally permissible to confer upon a prosecutor the discretion to decide to try a juvenile in a regular criminal court where the juvenile's conduct constitutes a criminal offense.

Whether it is constitutionally permissible to enact a procedure whereby a hearing on the issue of trial in criminal court is held by the chief judge of the circuit only if a juvenile court judge objects to the prosecutor's decision.

STATEMENT OF THE CASE.

The petitioner was tried and convicted of voluntary manslaughter.

The petitioner was sixteen years of age at the time of the offense. Pursuant to the statute challenged here, the prosecutor filed petitions to remove the case from juvenile court. The juvenile court judge heard arguments of counsel but entered no objection to the prosecutor's petitions. Thereafter, juvenile court actions were dismissed and the case was tried in the Criminal Court.

REASONS FOR DENYING THE WRIT.

The petitioner strives to present this case as one involving the problems resolved in *Kent* v. *United States*, 383 U. S. 541 (1966). In fact, the issues presented are not similar.

In *Kent*, the Court was faced with a statute that gave plenary power to the juvenile court to determine whether it should waive jurisdiction over the juvenile before it. And the statute required that a "full investigation" be conducted prior to the exercise of that power. The Illinois statute (Ill. Rev. Stat., Ch. 37, Sec. 702-7(3)) "does not vest jurisdiction in the court to determine the matter of waiver of jurisdiction." *People* v. *Handley*, 51 Ill. 2d 229, 233, 282 N. E. 2d 205 (1972). The Illinois statute does not require the full investigation that the *Kent* statute did. Essentially, the decision whether to proceed in the criminal courts is left to the discretion of the prosecutor. Further,

even if there is an objection by the juvenile court judge, it is not the juvenile court that decides the issue of jurisdiction. That decision is left to the chief judge of the Circuit Court. It is the obvious purpose of the Illinois statute to give the prosecutor the right to decide whether to proceed against a juvenile in the criminal court subject only to an affirmative act by the juvenile court to require a full hearing before the chief judge of the circuit.* Presumably such objections would rarely be made and the primary burden of decision is intended to be the prosecutor's.

Accordingly, the petitioner is objecting to a statute, not like the *Kent* statute, but one more like the present District of Columbia statute recently upheld in *United States* v. *Alexander*, 333 F. Supp. 1213 (D. D. C. 1971). In *Alexander* the Court upheld a statute which gave the United States Attorney the absolute power to transfer cases from juvenile court by the simple expedient of filing certain enumerated charges against juveniles. If the prosecutor was content with juvenile proceedings he could simply exercise his discretion not to charge. It would seem incredible to us that a similar Illinois statutory scheme would fall simply because a juvenile court judge is empowered to take an affirmative action to secure a hearing on the issue of removal. To so hold would be to encourage legislatures to withhold from juvenile courts any role in the process as Congress has done in the District of Columbia.

The sole remaining claim of petitioners is directed against the exercise of prosecutorial discretion without articulated standards. The argument has been made often in both state and federal courts (with respect to misdemeanor/felony and capital/non-capital charges) and always rejected.

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* Since the juvenile court judge did not object in this case, no question can be raised as to the nature and sufficiency of a hearing before the chief judge.

The Illinois rule is stated in *People* v. *Rhodes*, 38 Ill. 2d 389, 231 N. E. 2d 400 (1967) where the defendant could have been prosecuted under the misdemeanor or intimidation or the felony of attempt theft. The Court rejected defendant's argument that he had the right to be charged with an applicable misdemeanor rather than an applicable felony and that it was unlawful to allow the prosecutor to choose. The Court stated:

> "The State's Attorney is the representative of the People and has the responsibility of evaluating the evidence and other pertinent factors and determining what offense can properly and should properly be charged." See 38 Ill. 2d at 396. 231 N. E. 2d at 403.

The federal rule is unequivocably the same. In *Boggs* v. *Raines*, 273 F. 2d 636 (10th Cir. 1959), it was held that:

> "It is fundamental that one who commits acts constituting two offenses has no inherent right to be charged with the lesser of two offenses."

In *Erlich* v. *United States*, 238 F. 2d 481, 485 (5th Cir. 1957) the Court said:

> "A defendant cannot complain merely because this charge against him is brought under the statute carrying the more serious penalties when two statutes punish the same general acts."

Similar holdings are found in *Rosenberg* v. *United States*, 346 U. S. 273, 294-95 (1953); *United States* v. *Baumgarten*, 300 F. 2d 807, 808 (2nd Cir. 1962); *Siravo* v. *United States*, 377 F. 2d 469, 473 (1st Cir. 1967); *United States* v. *Eisenmann*, 396 F. 2d 565, 567-68 (2nd Cir. 1968); *Black* v. *United States*, 405 F. 2d 187 (5th Cir. 1968); *United States* v. *Escobar*, 410 F. 2d 749 (5th Cir. 1969).

CONCLUSION.

For the foregoing reasons, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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